No. 83-1315

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

RIVERBEND FARMS, INC.,

Petitioner,

v.

AGRICULTURAL LABOR RELATIONS BOARD,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Respondents.

On Petition for A Writ of Certiorari to the Supreme Court of the State of California

BRIEF IN OPPOSITION OF RESPONDENT AGRICULTURAL LABOR RELATIONS BOARD

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TABLE OF CONTENTS

LIST OF AUTHORITIES CITED

LIST OF AUTHORITIES CITED (Con.)

QUESTION PRESENTED

Whether the Agricultural Labor Relations Board (ALRB or Board) acted within its discretion in permitting an amendment to an unfair labor practice complaint in order to conform that complaint to the proof presented at hearing, where the amendment added as a party to the proceeding a corporation whose president and counsel were present throughout the hearing and were on notice of the corporation's potential involvement in and liability for the unfair labor practices alleged in the complaint.

STATUTES INVOLVED

Relevant provisions of the Agricultural Labor Relations Act, California Labor Code section 1140 et seq., are set forth at Pet. App. 210a-216a.

California Code of Civil Procedure section 469 provides:

> No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the Court may order the pleading to be amended upon such terms as may be just.

STATEMENT

1. Riverbend Farms, Inc. (Riverbend) and its wholly owned subsidiary, Rivcom Corporation (Rivcom), are California corporations. Riverbend is engaged in the business of packing and canning agricultural produce. The two corporations jointly farm a 4300-acre ranch, Rancho Sespe, in Ventura County, California. The ranch is devoted primarily to citrus crops. Riverbend packs and markets all the citrus grown at Rancho Sespe. The ranch is leased by Rivcom from Newport Beach Development Corp. (Newport). Newport acquired Rancho Sespe on January 16, 1979; it was previously operated by National Property Management Systems (NPMS).

In May 1978, the United Farm Workers of America, AFL-CIO (UFW or Union), a labor organization, won a representation election among the NPMS agricultural workers. The Agricultural Labor Relations Board (ALRB or Board) thereafter certified

the UFW as the exclusive bargaining agent of the NPMS workers at Rancho Sespe. At the time of the sale of the ranch, the Union and NPMS had been bargaining over the terms of a collective bargaining contract, although they had not yet reached an agreement.

Approximately 100 farm workers and their families resided at the ranch. These workers had been employed at Rancho Sespe for years, some for as many as twenty years. After Rivcom acquired control of Rancho Sespe, the company immediately served those employees and their families with eviction notices. Rivcom refused to hire any of the former NPMS workers; indeed, the company refused to even consider the former workers for employment. Rivcom also ignored the UFW's request for continued contract negotiations based on Rivcom's successor status, as well as the Union's request that the company hire the NPMS workers. Rivcom likewise refused to respond to the workers'

own attempted applications for employment.

In response to these events, the UFW filed various unfair labor practice charges with the Agricultural Labor Relations Board (ALRB or Board), alleging that Rivcom's conduct violated the Agricultural Labor Relations Act (ALRA or Act).[1/]

2. The General Counsel of the ALRB issued a complaint based on the Union's unfair labor practice charges, and the case was heard before an Administrative Law Officer (ALO) between March 1, 1979 and April 13, 1979. Riverbend, Rivcom, and Newport were all originally named in the complaint as respondents. On the first day of the hearing, however, Riverbend was dismissed as a party to the proceeding. (RT

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1. The ALRA is found at California Labor Code sections 1140 et seq.; it is modeled after the National Labor Relations Act and regulates agricultural employers, workers, and unions.

I: 5-7.)[2/] The ALO dismissed Riverbend because he was of the opinion that the General Counsel was predicating Riverbend's liability solely on Riverbend's status as the parent company of Rivcom. (RT III: 63.)

Larry Harris, the president of both Riverbend and Rivcom, was called as an adverse witness by the General Counsel on the second and third days of the hearing. On the third day of the hearing, the General Counsel closely questioned Harris about his relationship with Triple M, a labor contractor who supplied agricultural workers to Riverbend at Rancho Sespe, and about Harris' authority over the Riverbend and Rivcom workforces at Rancho Sespe. (RT: III: 43-58.) Harris' testimony raised

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2. Newport was dismissed as a party at the end of the General Counsel's case-in-chief. (Pet. App. 99a, fn.1.) References to the Reporter's Transcript of the unfair labor practice proceeding will appear as follows: (RT: Volume [No.]: Page [No].).

questions in the ALO's mind as to whether Riverbend might itself be an agricultural employer by virtue of Riverbend's relationship with Triple M (RT III: 58-63), and therefore liable for the alleged unfair labor practices as a joint employer with Rivcom. Such liability would be independent of Riverbend's status as Rivcom's parent corporation. At one point during the General Counsel's examination of Harris, the ALO asked attorney Thomas Campagne -- who had appeared on behalf of all three respondents (Riverbend, Rivcom, and Newport) at the pre-trial conference and on at least the first day of the hearing -- whether, in light of Harris' testimony, Campagne still maintained that Riverbend was not an agricultural employer. (RT III: 58-59.) The ALO pointed out that Harris' testimony, opened up the possibility that Riverbend was in fact employing workers at Rancho Sespe, and was, therefore, an agricultural

employer. (RT III: 60-63.) Campagne took issue with the ALO's analysis, arguing -- on behalf of Riverbend -- that Triple M, rather than Riverbend, was the actual employer. The ALO then stated for the record that Harris' testimony had opened up serious questions as to whether Riverbend was itself an agricultural employer under the ALRA. (RT: III: 65.)

On the final day of the hearing, the General Counsel moved to amend the complaint to include an allegation that Rivcom and Riverbend are joint employers. Although attorney Campagne argued, again on Riverbend's behalf, that there was not sufficient evidence to show a nexus between Riverbend and the Triple M workers (RT XVII: 18) -- which point was not then at issue -- Campagne did not argue surprise or prejudice. Nor did Campagne represent to the ALO that he needed additional time to present evidence on the joint employer

issue.3/

3. Adopting the findings of the ALO, the Board found that Rivcom and Riverbend were joint employers at Rancho Sespe; that the two companies had violated the ALRA by discriminatorily refusing to hire their predecessor's employees; and that they had unlawfully attempted to evict those employees from company housing. The ALRB further found that Rivcom and Riverbend were successor employers and that they had unlawfully refused to bargain with the UFW.4/ (Pet. App. 99a.)

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3. Campagne did request a continuance to present evidence relating to the General Counsel's amendment of the prayer to request make-whole relief. But this was the only continuance requested by the respondents. (RT XVII: 47, 50, 57.)

4. Riverbend has not challenged the substance of the Board's unfair labor practice findings or the substance of the Board's joint-employer finding; thus, no issue concerning these findings is raised in this Court.

Rivcom and Riverbend had earlier taken exception to the ALO's decision, claiming that they were allegedly denied a full opportunity to participate in the hearing due to the joint employer amendment. (CR 18, p. 4.)[5/] However, Riverbend at no time asked the Board to reopen the record to receive further evidence on the joint employer issue. Additionally, Riverbend did not present any argument in its brief to the Board to substantiate its claim that it had been denied due process by virtue of the last-day amendment alleging joint employer status. (CR 10.) Indeed, Riverbend merely argued to the Board that Riverbend and Rivcom could not be found to be a joint employer. (CR 19, pp. 113-120.)

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5. References to the Certified Record filed by the Board in this case will appear as "CR" followed by the number given the document in the "Memorandum of Documents", an index to the Certified Record which was submitted to the State Court of Appeal.

4. Riverbend and Rivcom jointly filed a petition for writ of review of the Board's decision, pursuant to California Labor Code section 1160.8, in the State Court of Appeal for the Fifth Appellate District.[6/] The two continued to be jointly represented by the law firm of Campagne and Giovacchini.[7/] Riverbend and Rivcom did not raise their due process argument during the two years in which the case was pending in the State Court of Appeal. The alleged denial of due process was raised to that

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6. Petitioner erroneously asserts that Riverbend, Rivcom, and Triple M separately appealed the ALRB's decision to the Court of Appeal. (Pet. 3.) Although Triple M filed its own petition for writ of review, Riverbend and Rivcom jointly filed a petition for writ of review and jointly filed briefs in that court.

7. The Court will note that the firm represents not only petitioner in the instant matter, but also represents petitioner Rivcom Corp. in Rivcom Corporation v. Agricultural Labor Relations Bd. and United Farm Workers, AFL-CIO, Case No. 83-1332, also pending in this Court.

court for the first time at oral argument. The Court of Appeal set aside the Board's decision and remanded the case back to the Board for reconsideration of a number of issues, including Riverbend's due process claim.

5. Following the issuance of the opinion of the Court of Appeal, the California Supreme Court granted the ALRB's petition for hearing, thereby vacating the decision of the appellate court.[8/] The Supreme Court upheld the Board's decision in all respects. Specifically, the court rejected Riverbend's claim that it had been denied due process. The court determined that Riverbend had notice of its potential liability on the third day of the hearing;

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8. The grant of hearing by the Supreme Court nullifies and vacates the decision of the intermediate appellate court. (See Hazelton v. City of San Diego, 183 Cal.App.2d 131, 136, 6 Cal.Rptr. 723 (1960); People v. Woods, 19 Cal.App.2d 556, 560, 65 P.2d 940 (1937).)

that attorney Campagne continued to act on Riverbend's behalf throughout the proceedings; that Campagne never asked that the unfair labor practice hearing be continued or reopened so Riverend could present further evidence on the joint employer issue; and that Riverbend "has never suggested any specific, material new evidence it would have adduced had the hearing been continued or reopened." (Pet. App. 21a.)

The court also noted that Riverbend had not raised the due process issue in its brief to the ALO; that it had not briefed the issue to the Board; and that it had not even raised the issue in the Court of Appeal until oral argument. Based on California law and applicable precedent of the National Labor Relations Act, the Supreme Court concluded that "it was well within the Board's discretion to allow the amendment and, upon finding joint-employer status, to

extend its remedial order to Riverbend." (Pet. App. 21a-22a.)

ARGUMENT

Petitioner's claims that it received no notice of its potential liability and had no opportunity to defend itself in the State unfair labor practice proceedings are wholly devoid of merit. Both Riverbend's allegations and the administrative record were carefully scrutinized by the State Supreme Court. After assessing petitioner's contention in light of the actual facts herein, the State court properly rejected petitioner's constitutional challenge to the ALRB's findings and remedial order. Accordingly, further review is unwarranted.

1. Petitioner's claim that it did not have any notice of its potential liability in the ALRB's unfair labor practice proceeding was considered and

properly rejected by the California Supreme Court. The court noted that the president of Riverbend, Larry Harris, was present throughout the proceedings. The court also noted that one or more members of the law firm representing Riverbend was also present throughout the hearing and, more importantly, "acted on Riverbend's behalf throughout." (Pet. App. 20a.) The court also pointed out that, on the third day of the hearing, the ALO specifically put Riverbend on notice of its potential liability by warning Riverbend's counsel that Harris' testimony seemed to indicate that Riverbend, as well as Rivcom, was actually employing farm workers at Rancho Sespe.[9/]

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9. Petitioner misrepresents the State Supreme Court's findings by claiming that the ALO's warning was made to Rivcom's counsel. However, the court specifically

(Footnote Continued)

Likewise, the State court rejected Riverbend's claim that it was denied an opportunity to present evidence due to the last-day amendment to the unfair labor practice complaint. The court pointed out that, at the hearing, Riverbend's counsel did not claim surprise or prejudice in response to the motion to amend and that Riverbend never asked that the hearing be continued or reopened so that the company could present further evidence on the

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(----Footnote 9 continued)

found that the law firm of Campagne and Giovacchini represented both Rivcom and Riverbend and acted for Riverbend throughout the hearing. It is only by distorting or entirely misrepresenting the administrative proceedings that Riverbend can even begin to suggest a denial of due process.

joint-employer issue.[10/] The court also (Pet. App. 21a.) took note of Riverbend's failure -- after finally raising the due process issue -- to even suggest "any specific, material new evidence it would have adduced had the hearing been continued or reopened." (Pet. App. 21a.)

In rejecting petitioner's claims, the State Supreme Court relied on California civil procedure, which permits amendments to conform to proof in the absence of prejudice to the opposing party. (Cal. Code Civ.

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10. The court's opinion suggests that it viewed petitioner's claim with some skepticism:

> Indeed, the due process-surprise argument was not raised in the growers' joint posthearing brief to the ALO. Though it was included in the 238 formal exceptions presented to the Board, the question was not briefed at that level. Nor was it asserted in the Court of Appeal until oral argument....

(Pet. App. 21a.)

Proc., sec. 469.)[11/] Here, Riverbend never demonstrated any prejudice stemming from the amendment, nor did the company even claim either surprise or prejudice at the time the General Counsel moved to amend the complaint.[12/] The State court also relied

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11. See also Fifth & Broadway Partnership v. Kimny, Inc., 102 Cal.App.3d 195, 162 Cal.Rptr. 271 (1980) in which the appellate court permitted the amendment of a complaint after the defendant (Kimny) rested its case. The amendment added Kimny, Inc, as a defendant; judgment was then entered against Kimny, Inc. only. In upholding the trial court's decision to permit the amendment, the appellate court relied on Ca'ifornia Code of Civil Procedure section 473 which permits, on such terms as may be proper and in furtherance of justice, amendment of any pleading by adding the name of any party.

12. This was in marked distinction to counsel's reaction to a proposed amendment to the prayer of the unfair labor practice complaint; on behalf of Riverbend and Rivcom, counsel requested a week's continuance to meet the amendment. (See RT XVII: 47, 50, 51; CR 18, p. 5.) Counsel also contended that various other amendments were prejudicial. (RT XVII: 26, 29, 33.)

on applicable NLRB precedent, specifically referring to Royal Typewriter Co. v. N.L.R.B., 553 F.2d 1030, 1043-1044 (8th Cir. 1976); N.L.R.B. v. Jordan Bus Co., 380 F.2d 219, 222-223 (10th Cir. 1967); and Hillside Manor Health Related Facility, 257 NLRB 981, 984-985 (1981), enforced 697 F.2d 294 (1st Cir. 1982).

Riverbend argues that the NLRB precedent cited by the court is irrelevant, because the holdings in each of those cases were based on a finding that "the party asserting due process violations had failed to exploit an opportunity to defend." (Pet. 17.) However, petitioner misrepresents the rulings in those cases; indeed, they are directly apposite herein.

In Royal Typewriter Co. v. N.L.R.B., supra, 533 F.2d 1030, the Eighth Circuit found Royal's parent company, Litton Industries, liable for Royal's unfair labor practices, despite the fact that Litton had

neither been named in the unfair labor practice complaint as a respondent nor had been a party to the unfair labor practice proceedings. There, Litton was added as a party after all the evidence had been taken and the case was before the NLRB. The national board at that point granted the general counsel's motion to amend the complaint to include Litton.[13] In upholding the NLRB's action, the Court of Appeals noted that Litton's counsel had been present during most of the presentation of the evidence on the single-employer issue. The court concluded that Litton was not prejudicially denied an opportunity to be heard at a meaningful time and in a meaningful manner.

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13. The NLRB ordered that the hearing be reopened so that Litton could present evidence or argument on the single-employer issue, but Litton declined to participate in the reopened hearing.

The principal difference between Royal Typewriter and the instant case is the timing of the amendment to the complaint. Here, the complaint was actually amended at hearing, and Riverbend did not request additional time to introduce evidence on the joint employer issue. Given that Rivcom expressed neither surprise nor prejudice, and did not request an adjournment or ask the Board to reopen the record, the State Supreme Court -- like the Eighth Circuit in Royal Typewriter -- properly concluded that the ALRB was well within its discretion in permitting the amendment. In a very real sense, then, Riverbend, like Litton, also failed to exploit its opportunity to defend itself, if, indeed, petitioner had any additional relevant evidence to introduce on

the joint employer issue.[14/]

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14. Coe v. Armour Fertilizer Work 237 U.S. 413 (1915) and Zenith Radio Corp. v. Hazeltine Research, Inc. 395 U.S. 100 (1969), both cited by petitioner, are not on point. In Coe, Armour attempted to levy on Coe's property on the basis of a judgment obtained against a defunct corporation. Coe was a shareholder in that corporation and allededly had an unpaid stock subscription. This Court ruled that Coe was entitled to contest the validity of the judgment, to contest whether he was in fact a shareholder and indebted to the corporation, and to present any other defenses personal to himself. In Zenith, the Court held that the trial court improperly imposed liability on the parent company of defendant Hazeltine Research Inc., since the parent company "was not named as a party, was never served and did not formally appear at trial." (395 U.S. at 110.) Both cases are factually distinguishable, because here Riverbend was included as party to the unfair labor practice litigation and had an opportunity to present its evidence and defenses. In short, Riverbend had its day in court, and if it chose not to fully avail itself of its opportunities, either at hearing or by later reopening the record, it can not now claim a denial of due process.

N.L.R.B. v. Jordan Bus Co., supra, 380 F.2d 219 is also directly on point. There, in the course of a representation proceeding, the NLRB determined that Jordan and a second company, Denco, were a single employer. Denco was not originally named as a party in the union's representation petition, but, during the course of the representation hearing, the evidence indicated a close relationship between the two companies. The hearing was adjourned for two days; Denco received notice on the morning the hearing reconvened and requested a continuance, which request was denied. The hearing examiner suggested that Denco review the record and that, if the company determined that it was incomplete or inaccurate, a motion to reopen the record would be appropriate. Although Denco later moved for further hearing, that motion was denied.

In upholding the NLRB's action, the Court of Appeals observed that Denco had not given any reason at all when it requested a further hearing. The court held that, in the absence of some specific representation that contrary evidence was available, the court could discern no valid grounds for further hearing, and concluded that the NLRB's proceedings had not deprived Denco of the right to a full hearing after notice.

In the last case referred to by the State Supreme Court, Hillside Manor Health Related Facility, supra, 257 NLRB 981, the national board approved the ALJ's findings that Hillside and a second company, Environmental, were joint employers, despite the fact that Environmental had not been named as a respondent in the unfair labor practice proceeding. The board also approved the ALJ's suggested remedial order, which required affirmative action by both

Hillside and Environmental.[15] There is simply no basis for petitioner's assertion herein that Environmental had failed to exploit an opportunity to defend itself. The case directly supports the ALRB's decision, especially in view of the fact that Riverbend was named as a party, albeit late in the proceedings.

Riverbend cites N.L.R.B. v. Complas Industries Inc. 714 F.2d 729 (7th Cir. 1983), in support of its argument that the ALRB improperly permitted the amendment to the complaint herein. In that case, the Seventh Circuit found that the NLRB exceeded the scope of its authority by amending the

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15. Hillside Manor Health Related Facility, supra, can be distinguished factually from the instant case. Hillside admitted that it was a joint employer with Environmental. (See ALJD, p. 3, fn. 4.) But, the ALJ also found sufficient control by Hillside over Environmental's employees and over their work to justify a finding of joint employer status even without that admission.

complaint during a one-day hearing, over the employer's repeated objections. The amended complaint included a totally different unfair labor charge, and the employer was not granted an adjournment to marshall its evidence to meet that charge. Under such circumstances, the court found that Complas was denied an opportunity to meet the amended claim.

Complas is obviously distinguishable. Here, there was neither a request for an adjournment nor any objection based on surprise or prejudice. The General Counsel's theory of the unfair labor practice case remained constant throughout the proceedings. Lastly, Riverbend was on notice from the third day of the hearing that it was potentially liable as a joint employer of the Rancho Sespe workforce. The court's analysis in Complas Industries actually supports the State Supreme Court's

opinion herein:

> Whether fair notice is given by way of pleading, or by way of the course of the proceeding of a full litigation, the critical focus at all times is on whether notice was given which provided the party with an opportunity to prepare and present its evidence.

(714 F.2d at 734.) Here, Riverbend was given notice of its potential liability on the third day of a 17-day hearing and it never sought additional time after the amendment to prepare or present its evidence, if any.16/

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16. In seeking to defeat liability herein, Riverbend also relies on three cases dealing with the liability of (1) a purchaser of the assets of an employer found to have committed unfair labor practices (Marine Machine Works, Inc., 243 NLRB 1081 (1979); (2) an alter ego of an employer found to have committed unfair labor practices (George C. Shearer Exhibitors, 246 NLRB 416 (1979), enforced without opinion 636 F.2d 1210 (3rd Cir. 1980); and (3) the shareholder of a defunct corporation found to have committed unfair labor practices (Dews Construction Corp., 246 NLRB 945 (1979). None of those cases is apposite here. Riverbend was actually amended in as

(Footnote Continued----)

Petitioner also relies on In re Ruffalo, 390 U.S. 544 (1968) in support of its argument that the amendment adding Riverbend as a party deprived petitioner of due process. Riverbend suggests that Harris, without any knowledge of Riverbend's potential liability, was trapped into giving testimony which later resulted in unfair labor practice charges against Riverbend and the imposition of liability on the company. First, petitioner never raised this "entrapment" argument in the State courts;

(----Footnote 16 continued)

a party to the unfair labor practice proceedings and had an opportunity to litigate its status as a joint employer of the Rancho Sespe workforce. In each of the three above-cited cases, the NLRB's General Counsel attempted to impose liability on persons or entities whose status and relationship to the wrongdoer had not yet been litigated; thus, their responsibility for the previous employer's unfair labor practices likewise had not yet been determined.

and thus, this Court is without jurisdiction to now consider it. (Herndon v. State of Georgia, 295 U.S. 441, 443 (1935).) Second, this case is distinguishable from Ruffalo. Here, Riverbend was originally a party and was well aware of the nature of the unfair labor practice charges. Petitioner was only dismissed as a party because the ALJ did not believe that Riverbend was an agricultural employer. Harris knew the charges involved in the proceedings -- those charges in fact never varied -- and he knew too of Riverbend's potential liability if the General Counsel established that Riverbend was employing agricultural workers. Thus, Harris' situation differed markedly from that of the attorney in Ruffalo. Lastly, as illustrated by Royal Typewriter, Jordan Bus Co., and Hillside Manor, supra, amendment of NLRB unfair labor practice complaints, including an amendment adding additional parties, is liberally allowed. The NLRB has

in fact been held to have a obligation to decide all material issues which were fully litigated, even those not specifically pleaded. (Soule Glass and Glazing Co. v. N.L.R.B., 652 F.2d 1055, 1074 (1st Cir. 1981).) The ALRB has the same duty. (Superior Farming Co., Inc. v. Agricultural Labor Relations Bd., 151 Cal.App.3d 100, 112, 198 Cal.Rptr. 608 (1984).)

CONCLUSION

Since Riverbend has failed to establish that the amendment to the complaint, which added it as a respondent to the Board's unfair labor practice proceedings, deprived it of an opportunity to prepare and present its evidence, petitioner's allegation that it was denied due process must fail. The State Supreme Court properly determined that the amendment did not deprive Riverbend of notice and a meaningful opportunity to be heard.

Accordingly, the petition for writ of certiorari should be denied.

Dated: April 13, 1984

Respectfully submitted,

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